

1 Hon. Ken Schubert, Chief Civil Judge
2 Applic. for Writ of Review or Certiorari
3 Noted for: 1/10/2019
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CITY OF SEATTLE, SEATTLE POLICE
DEPARTMENT,

Petitioner,

vs.

SEATTLE POLICE OFFICERS' GUILD,
ARBITRATOR JANE WILKINSON and
ADLEY SHEPHERD

Respondents.

No.

**APPLICATION FOR WRIT OF
REVIEW OR CERTIORARI**

I. INTRODUCTION

Petitioner City of Seattle, Seattle Police Department ("SPD") respectfully requests that a Writ of Review or Certiorari issue to Arbitrator Jane Wilkinson directing her to fully certify to this Court the records and files of the Disciplinary Review Board ("DRB") regarding the appeal and decision in the matter of Officer Adley Shepherd. Officer Shepherd's employment with SPD was terminated after he punched and fractured facial bones of a handcuffed suspect as she sat in the back of a patrol car. The Seattle Police Officer's Guild ("SPOG") challenged the termination pursuant to its collective bargaining agreement ("CBA") with SPD. The matter proceeded to a hearing before a DRB comprised of an SPD officer appointed by SPOG, a management representative, and a neutral arbitrator, Jane Wilkinson. Following a five-day hearing in June 2018, Arbitrator Wilkinson issued the DRB's

1 Opinion and Award (the “Decision”). The Decision confirmed that Officer Shepherd violated SPD
2 policy, but nevertheless reduced the discipline from termination to a 15-day suspension. Because
3 this Decision is contrary to the established public policy against use of excessive force in policing,
4 SPD now seeks a writ of review or certiorari vacating the Decision.

5 **II. GROUNDS FOR APPLICATION**

6 **A. The Incident**

7 Officer Shepherd encountered Miyekko Durden-Bosley around 2:30 a.m. on June 22, 2014.
8 *See Ex. A to the Declaration of Sarah Tilstra, at 1.* Officer Shepherd responded to a domestic
9 violence call in which another woman alleged that Ms. Durden-Bosley had threatened her son. *Id.*
10 at 2. Ms. Durden-Bosley arrived at the scene after Officer Shepherd. *Id.* at 3. After extended,
11 unpleasant interactions among several people, “Officer Shepherd exclaimed, ‘My patience is done.
12 It’s done. It’s over. So, somebody’s going to go to jail. Who’s it going to be?’” *Id.* He taunted
13 Ms. Durden-Bosley, saying “we can do eenie, meenie, miney” before arresting her, placing her in
14 handcuffs, and escorting her to a patrol car. *Id.* at 3-4. While sitting in the car, Ms. Durden-Bosley
15 kicked at Officer Shepherd while yelling an expletive. *Id.* at 4. Officer Shepherd stepped back and,
16 about two seconds after being kicked, dove into the car and punched Ms. Durden-Bosley’s right eye
17 with his fist.¹ *Id.* at 5.

18 As a result of the blow to her face, “Ms. Durden-Bosley suffered a serious, but not permanent
19 injury to her right eye,” described in the medical report as “a very small, minimally displaced orbital
20 floor fracture (right) along the infraorbital canal and similarly minimally displaced medial wall
21 fracture right eye.” *Id.* at 6. Both Officer Shepherd and Ms. Durden-Bosley were taken to
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23 ¹ In-car video of the interaction is available at https://www.youtube.com/watch?v=xdZkFO_5jvA (last viewed December 13, 2018).

1 Harborview Medical Center. *Id.*

2 **B. Investigation and Termination**

3 The Office of Professional Accountability (“OPA”) investigated Officer Shepherd’s conduct,
4 and sustained charges that he violated SPD policies prohibiting unreasonable use of force, prohibiting
5 use of force against restrained subjects except in exceptional circumstances, and requiring use of de-
6 escalation tactics. *See Tilstra Decl.*, Ex. B at 10-13. SPD prepared a recommendation for Officer
7 Shepherd’s termination (*id.* at 14), and Officer Shepherd met with then-Chief of Police Kathleen
8 O’Toole for a Loudermill² hearing. Ex. A at 7. Chief O’Toole was disturbed by Officer Shepherd’s
9 unwillingness to acknowledge that he did anything wrong when punching Ms. Durden-Bosley. *Id.* at 7-
10 8. Chief O’Toole concluded that termination was the only appropriate level of discipline, and noted that
11 the violation of SPD’s policy on treatment of subjects in handcuffs was serious enough to warrant
12 termination. Ex. B at 17.

13 **C. SPOG’s Appeal and the DRB’s Decision**

14 SPOG appealed Officer Shepherd’s termination. *See Tilstra Decl.*, Ex. C at 10. The issues
15 before the DRB were (1) whether Officer Shepherd used excessive force in violation of SPD’s use of
16 force policy, and (2) if so, whether discharge was the appropriate penalty. *See Ex. A at 18, 21.* After
17 the June hearing, the parties submitted briefs on the issues. *See Exs. B and C.* Arbitrator Wilkinson
18 issued the Decision on November 18, 2018, which concluded that “Officer Shepherd violated the
19 City’s use of force policy, particularly 8.100 subsection 2 (which allows force on a handcuffed suspect
20 only to prevent escape, injury or destruction of property) when he struck Ms. Durden-Bosley in the

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² *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 547-48, 105 S. Ct. 1487, 84 L. Ed. 2d. 494 (1985) (public employee has due process right to pre-termination hearing).

1 eye, causing injury.”³ Ex. A at 21. However, she also concluded that several mitigating factors
2 (including testimony that Officer Shepherd acted as trained, the lack of progressive discipline, and the
3 length of his employment) required reinstatement of Officer Shepherd, coupled with a 15-day
4 suspension. *Id.* at 22-31. The City contends that returning Officer Shepherd to duty as a police officer
5 in these circumstances is a violation of Washington public policy.

6 **III. AUTHORITY FOR ISSUING WRIT OF REVIEW OR CERTIORARI**

7 A superior court has the power to issue statutory or constitutional writs of certiorari.⁴ Chapter
8 7.16 R.C.W., Const. art. IV, § 6. “Both the statutory and constitutional writs share a common purpose:
9 to enable limited appellate review of a judicial or quasi-judicial action when the remedy of appeal is
10 unavailable.” *Coballes v. Spokane County*, 167 Wn. App. 857, 865, 274 P.3d 1102 (2012). Here,
11 there is no right to appeal the Decision, as the CBA provides that the DRB’s decision is final and
12 binding, and that additional appeals through the grievance process or the Public Safety Civil Service
13 Commission are foreclosed. *See Tilstra Decl.*, Ex. E at 9. Because there is no plain, speedy, or adequate
14 remedy at law (*see RCW 7.16.040*), a writ is therefore the only avenue for review.⁵

15 This Court should grant a writ because the Decision violates the public policy against excessive
16 use of force in policing. Washington courts recognize that an arbitration award arising out of a collective
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18 ³ SPD’s revised use of force policy arose from a Consent Decree entered into between SPD and the U.S. Department of
19 Justice (“DOJ”), and approved by a federal district court judge in 2012. *See Ex. A at 14-15; see also Tilstra Decl.*, Ex.
20 D. DOJ believed SPD engaged in a pattern or practice of constitutional violations regarding police use of force. *See Ex.*
D, ¶ 15. SPD’s revised use of force policy was approved by the court monitor and took effect in January 2014, months
before the incident in question here. *See Ex. A at 15, Ex. B at 31-32.*

21 ⁴ King County Local Rule 98.40 sets forth the requirements for an application for a writ. These requirements are met in
this application and the pleadings filed herewith.

22 ⁵ A statutory writ is available when an inferior board or officer, exercising judicial functions, exceeds its jurisdiction, acts
illegally, “or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common
law.” RCW 7.16.040. A constitutional writ of certiorari requires the petitioner to allege facts that, if true, show that the lower
tribunal’s decision was arbitrary and capricious or illegal. *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840,
846, 991 P.2d 1161 (2000). Given the public policy violation, SPD has met the requirements for either type of writ.

1 bargaining agreement can be vacated if it violates public policy. *Kitsap County Deputy Sheriff's Guild*
2 v. *Kitsap County*, 167 Wn.2d 428, 436-36, 219 P.3d 675 (2009). The court treats the decision as if it
3 were part of the agreement, and will vacate the decision if it violates an “explicit, well defined, and
4 dominant public policy, not simply general considerations of supposed public interests.” *Int'l Union*
5 of *Operating Engineers, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 721, 295 P.3d 736 (2013)
6 (internal quotations omitted). If an arbitrator’s award is so lenient that it does not impose sufficient
7 discipline to deter future violations of the public policy at issue, it must be vacated. *See id.* at 723.

8 Here, there is an explicit, well-defined, and dominant public policy against the excessive use
9 of force in policing. This public policy is drawn from numerous sources. First, the Fourth
10 Amendment of the U.S. Constitution requires that a police officer’s use of force be reasonable.
11 *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Second, the
12 Consent Decree entered into between SPD and the DOJ, pursuant to the DOJ’s findings that it had
13 reasonable cause to believe that SPD had a pattern or practice of using unnecessary or excessive
14 force in violation of the Fourth Amendment and the Violent Crime Control and Law Enforcement
15 Act of 1994, 42 U.S.C. § 14141, requires the use of force to be consistent with *Graham*, and
16 specifically prohibits reportable use of force against handcuffed suspects except in certain
17 circumstances. *See Ex. D, ¶ 70.* Third, SPD’s own use-of-force policies, revised in January 2014
18 pursuant to the Consent Decree, require objectively reasonable force and prohibit the use of physical
19 force against handcuffed suspects except in exceptional circumstances. *See Tilstra Decl., Ex. F.*
20 Fourth, Initiative 940, approved by Washington voters in November 2018, includes a requirement
21 that police officers receive violence de-escalation training, further codifying the public policy
22 against excessive use of force. *See Tilstra Decl., Ex. G.* Finally, other jurisdictions have recognized
23 the public policy against excessive force. *See, e.g., City of Richfield v. Law Enforcement Labor*

Servs., Inc., 910 N.W. 2d 465, 474-75 (Minn. Ct. App. 2018) (“It is undisputed that in Minnesota, there is a well-defined and dominant public policy against police officers using excessive force.”), *rev. granted* June 19, 2018. These sources establish the explicit, well-defined, and dominant public policy against excessive use of force in policing. The Decision to reinstate an officer who punched in the face a handcuffed suspect seated in a patrol car was so lenient as to violate this public policy. This Court should grant SPD’s request for a writ.

III. APPLICATION FOR WRIT OF REVIEW OR CERTIORARI AND PRAYER FOR RELIEF

SPD asks this Court to issue a Writ of Review or Certiorari to Arbitrator Wilkinson directing her to return to this Court her records and files relating to the Decision. SPD further asks that this Court, having reviewed the record, enter judgment in favor of SPD, conclude that reinstatement of Officer Shepherd violates the well-established Washington public policy against excessive use of force in policing, and vacate the Decision.

IV. ORDER

SPD submits a Proposed Order with its application for a Writ of Review or Certiorari.

DATED this 14th day of December, 2018.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this date, I electronically filed the foregoing document, along with a Case Information Cover Sheet, Notice of Court Date, and supporting Declaration of Sarah Tilstra, with the Clerk of the Court using the ECR E-filing Application, and caused a true and correct copy of those same documents, along with a Proposed Order, to be served on the following in the manner(s) indicated:

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DATED this 14th day of December, 2018, at Seattle, Washington.

s/ Kim Fabel

KIM FABEL
Legal Assistant